

INQUIRY CONCERNING A JUDGE

No. 75

TO: JUDGE DAVID PRESS:

Preliminary Investigation having been made pursuant to the provisions of Rule 904 of the California Rules of Court concerning censure, removal, retirement or private admonishment of judges, during the course of which preliminary investigation you were afforded a reasonable opportunity to present such matters as you chose, and this Commission as a result of said preliminary investigation, having concluded that formal proceedings to inquire into the charges against you shall be instituted pursuant to section 18 of Article VI of the California Constitution and in accordance with rules 901-922, California Rules of Court,

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COUNT ONE

It is charged that you have abdicated your judicial responsibility to respect and comply with the law. This behavior is exemplified by, but not limited to, the following incidents:

(1) In People v. Scott Mackie, TCF 26509, on April 29, 1985, you directed defense counsel, William Drake, to file an Engrossed Statement on Appeal. Mr. Drake complied on May 22, 1985, alleging four grounds of appeal including instructional error. You felt two of the grounds were not sufficiently specific and continued the matter to June 3, 1985, for filing an Amended Engrossed Statement on Appeal. On June 3, 1985, Mr. Drake submitted an Amended Engrossed Statement on Appeal. You disagreed with Mr. Drake's characterization of the events and ordered Mr. Drake to strike a ground for appeal. When Mr. Drake refused to strike any grounds from his statement you reiterated your order to strike the ground for appeal. Mr. Drake was forced to seek extraordinary relief to have his appellate grounds presented to the Superior Court.

(2) In April of 1985, Judge Edward Heap presided over cases in which an Affidavit of Prejudice had been filed against you. You sat in the courtroom during some of the proceedings. During the course of a trial you had been disqualified from hearing, you approached the bench and told Judge Heap if the defendants would not stipulate to paying \$200 as court appointed attorney fees, a Penal Code section 987.8 hearing should be set

in two weeks before you.

(3) On March 25, 1986, in People v. Mark Magdaleno, T48896, evidence was taken from the defendant prior to the prosecution's establishment of a prima facie case. You found the defendant guilty.

(4) In 1985 or 1986, Deputy Sheriff Rob Carson issued a citation to a male driver for making an unsafe u-turn. At trial, Deputy Carson informed you he did not remember issuing the citation. You suggested if the defendant testified first, perhaps Deputy Carson would remember the circumstances. The defendant then testified. The defendant's testimony refreshed Deputy Carson's memory regarding the citation. Deputy Carson then took the stand and testified. You found the defendant guilty of the charge.

(5) In People v. Earl Davis, TCF28222, on August 28, 1986, defense counsel, Scott McCraw, was advised by the prosecutor that the prosecution could not prove Mr. Davis drove his vehicle while his license was suspended or revoked (Vehicle Code section 14601.1 subd.(a)). Mr. McCraw made a motion to dismiss that charge. Thereafter, Mr. McCraw was relieved as counsel for Mr. Davis, upon your determination Mr. Davis could afford to hire counsel. In response to the motion to dismiss, you directly questioned Mr. Davis about the status of his driver's license. After your questioning of Mr. Davis you refused to accept a dismissal of that charge.

(6) In People v. Michael White, TCF 28595, TCF 28624, the defendant was charged with driving on a suspended or revoked

driver's license (Vehicle Code section 14601.1, subd. (a)). On February 23, 1987, the prosecution moved to dismiss both cases for insufficient evidence. Prior to dismissing the cases you asked Mr. White: "Do you have a valid California driver's license?" The Deputy Public Defender objected to your question. You then dismissed the charges.

Following the dismissal, you offered the defendant a stipulation regarding the reimbursement of the County for the services of the Public Defender under Penal Code section 987.8. You were willing to set the fee for the public defender at \$200, despite the fact the Deputy Public Defender informed you he had spent only three to five minutes on Mr. White's cases. The \$200 figure had no relation to the actual cost of the Public Defender's services.

(7) Defendant Walter Mashtalir appeared before you in People v. Walter Mashtalir, MCF00898, MCF00899, MCF00900. Mr. Mashtalir was represented by the Public Defender in those cases. On September 30, 1985, Mr. Mashtalir was placed on probation on the condition he remain in psychiatric counselling at a psychiatric hospital. At the time of sentencing on September 30, 1985, you put off a hearing on the possible reimbursement of attorney fees under Penal Code section 987.8, until March 31, 1986. You have since continued the hearing every six months, with the last hearing set for June 1, 1987, despite the provisions of Penal Code section 987.8 and despite the fact Mr. Mashtalir's financial statement submitted in 1985 reflects he is totally disabled and his sole source of income comes from social

security benefits and veteran's benefits.

(8) On August 13, 1984, pursuant to a plea bargain, the case of People v. Wesley Pearce, MT24009, was dismissed. You set a hearing for October 1, 1984, to assess attorney fees pursuant to Penal Code section 987.8. When the defendant failed to appear for the October 1, 1984, hearing, you ordered a bench warrant issued and set bail at \$1,000.

(9) In November of 1984, Deputy Public Defender John Roth filed a petition for writ of prohibition/mandate in Harris Niffenegger et. al. v. Crest Forest Justice Court, San Bernardino Superior Court No. 225096. On November 19, 1984, in open court, after you were served with the alternative writ, you displayed an apparent personal involvement in the case by asking Mr. Roth the following about the writ:

"THE COURT: . . . And may I also have your answer as to the time that you saw the Superior Court judge and when did he sign it?

"MR. ROTH: I don't have any specific recollection as to the time he signed it . . .

"THE COURT: And was that on the 14th of November?

"MR. ROTH: I don't have the paperwork in front of me. If that's what the Court's copy reflects . . . I'd have no reason to dispute that.

"THE COURT: Was it in the morning or afternoon?

"MR. ROTH: I don't recollect.

"THE COURT: Were you present when Judge Bierschbach signed it?

"MR. ROTH: Present where? In his immediate sight, or in the courtroom?

"THE COURT: In the court.

"MR. ROTH: Yes, I was present in the courtroom."

Furthermore, you accused Mr. Roth of making false representations in the writ and attempting to defraud the Superior Court when you stated:

"THE COURT: I'm a bit ashamed, actually, for you, Mr. Roth, because to do something surreptitious has generally not been your practice, and because of the inflammatory statements and the way this was handled, the insinuations, the false statements that you made in the writ, I think have given me reason to be a little bit upset, and I feel that you attempted to defraud the Superior Court in what you did."

(10) On August 13, 1984, in People v. Wesley Pearce, MT24009 and MT23791, both cases involving charges of violation of Vehicle Code section 14601 (driving on a suspended license), pursuant to a plea bargain agreement by Deputy District Attorney William Timmerman and Deputy Public Defender John Wong, Mr. Pearce pled guilty, before you, to charges contained in MT23791. One case (MT24009) was dismissed in its entirety. On January 20, 1986, Mr. Pearce was before you on two other matters (TCF 26664 and T46637). You continued the disposition of Mr. Pearce's cases to January 22, 1986, to determine if the District Attorney and Public Defender perpetrated a "fraud" on the court in conjunction with the August 13, 1984 plea by not informing you that Mr. Pearce had received another citation two days before entry of the

plea bargain.

Deputy Public Defender John Roth and Deputy District Attorney Keith Davis were present at the January 22, 1986 hearing. In open court you stated to Mr. Roth and Mr. Davis: ". . . it appears that the Public Defender's Office and the District Attorney's office and Mr. Pearce may have perpetrated a fraud upon this court." You inquired of Mr. Roth and Mr. Davis about why you had not been informed of the facts surrounding the plea bargain in the 1984 Pearce cases (MT23791 and MT24009) since you had previously made inquiries of the District Attorney and Public Defender concerning their actions in handling those cases. Your accusation and inquiry was made because you were "interested in knowing" what had occurred in connection with the 1984 cases.

(11) In People v. Edward Edwards, MCF00143, on July 11, 1984, the scheduled trial date, the parties had agreed to a civil compromise of the case. You refused to accept the civil compromise. A trial commenced and ended in a mistrial on the first day testimony was taken. Following the mistrial, the parties agreed to a civil compromise of the case. You refused to accept the civil compromise unless the defendant agreed to pay \$500 in court costs. You imposed \$500 in costs without regard to the actual costs incurred and refused to reduce that figure despite defense attorney Rex Victor's contention the costs were punitive.

(12) In 1985, in People v. Douglas Haines, TCF26727, the defendant was charged with driving under the influence of alcohol. Mr. Haines was also charged in a San Bernardino case

with the same offense. (People v. Douglas Haines, San Bernardino Municipal Court Case No. TSB51685.) Mr. Haines was represented in those cases by Attorney Donald Jordan. Mr. Jordan worked out a plea bargain agreement with the District Attorney in San Bernardino in which Mr. Haines would plead guilty to a driving under the influence charge in San Bernardino and he would plead guilty to reckless driving in the Crest Forest case. On November 18, 1985, you refused to accept the plea as it related to the Crest Forest case. Jury trial was set for December 4, 1985, with a readiness conference set for December 2, 1985.

On December 3, 1985, Mr. Jordan's secretary telephoned the court and stated Mr. Jordan had obtained written approval to transfer the case to San Bernardino. It is the policy of your court to accept all transfers which have previously been approved in writing by the Presiding Judge of the Municipal Court. On December 4, 1985, the written Consent to Transfer form was presented to the court by a representative of Mr. Jordan's office. Deputy Public Defender John Roth made a special appearance to present the Consent to Transfer. You approved the transfer, but only on the condition Mr. Jordan personally appear on December 23, 1985, to explain why he was not personally present December 4th.

Mr. Jordan personally appeared December 23, 1985, under the threat of contempt. At that time you continued the matter to January 13, 1986, and required Mr. Jordan file a report with you on the disposition of the case. Your actions in requiring Mr. Jordan to personally appear to explain why he was not personally

present for a ministerial act and your requirement that Mr. Jordan report on the disposition of the case caused Mr. Jordan undue expense and inconvenience.

(13) On February 13, 1985, you instituted a rule for the Crest Forest Court which requires members of the court clerk's office to contact you before official court records are shown, given or sent to anyone. You further require that you be informed of the date, time and name of the person requesting to look at the file, and that such information be recorded in the court docket.

COUNT TWO

It is charged that you have abdicated your judicial responsibility to be patient, dignified and courteous to attorneys and others with whom you have dealt in your official capacity. This behavior is exemplified by, but not limited to, the following incidents:

(1) On September 11, 1985, in People v. David Williams, MCF00991-B, the matter was set for jury trial. The prosecutor, Deputy District Attorney Robin Dougherty informed you her witnesses were out of state and she would be unable to proceed. In open court, while excusing the jury panel, you blamed Ms. Dougherty for inconveniencing the jury and made disparaging remarks about Ms. Dougherty personally and the Office of the District Attorney generally. Ms. Dougherty was humiliated

and embarrassed by your statements.

(2) Deputy Public Defender John Roth filed a petition for writ of prohibition/mandate in Niffenegger et.al. v. Crest Forest Justice Court, San Bernardino Superior Court Case No. 225096. On November 16, 1984, the San Bernardino Superior Court issued an Amended Alternative Writ ordering you to desist from taking any further action in those cases. On November 19, 1984, you accused Mr. Roth, in open court, of being deceitful in the obtaining of the writ, when you stated: "I'm a bit ashamed, actually, for you, Mr. Roth, because to do something surreptitious has generally not been your practice, and because of the inflammatory statements and the way this was handled, the insinuations, the false statements that you made in the writ, I think have given me reason to be a little bit upset, and I feel that you attempted to defraud the Superior Court in what you did."

You then publicly forbade him from entering the Clerk's office, stating: "I feel that there is some question as to your ethical conduct, Mr. Roth, and for that reason at this point, I'm going to request that you deal with the Court in a proper manner. I'll stand for no more insolence. I'll not permit you to enter the clerk's office at any time. If you have any business with the clerks, you'll deal with them from across the counter. You'll . . . give no oral orders to any of the clerks to give you anything. Any . . . other motions are to be made in writing to this Court or done in open court." Mr. Roth was reportedly offended and upset by your remarks.

(3) On January 22, 1986, in People v. Wesley Pearce, MT24009 and MT23791, in open court, you stated to Deputy Public Defender John Roth and Deputy District Attorney Keith Davis:

" . . . it appears that the Public Defender's Office and the District Attorney's office and Mr. Pearce may have perpetrated a fraud upon this court." You inquired of Mr. Roth and Mr. Davis about why you had not been informed of the facts surrounding a plea bargain which had occurred in 1984 regarding two Pearce cases (MT23791 and MT24009) since you had previously made inquiries of the District Attorney and Public Defender concerning their actions in handling those cases. Neither Mr. Roth nor Mr. Davis were personally involved in the 1984 plea bargain. Mr. Roth and Mr. Davis were reportedly offended and upset by your remarks.

It is asserted that your conduct as charged in this and in each of the preceding counts constitutes wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute within the meaning of subdivision (c) of section 18, article VI, California Constitution.

You have the right to file a written answer to the charges against you within fifteen (15) days after service of this notice upon you with the Commission on Judicial Performance, Fox Plaza, Suite 304, 1390 Market Street, San Francisco, California 94102. Such answer must be verified, must conform in style to subdivision (c) of Rule 15 of the Rules of Court, and must consist of an original and eleven (11) legible copies.

BY ORDER OF THE COMMISSION ON JUDICIAL PERFORMANCE.

DATED: July 22, 1987

Joe. Samuels
Chairperson